FOONG WENG YEE

v.

MALAYSIA SMELTING CORPORATION BHD.

COURT OF APPEAL, KUALA LUMPUR
DATO' MAHADEV SHANKAR JCA
DATO' V.C. GEORGE JCA
DATO' HJ. ABDUL MALEK BIN HAJI AHMAD J
[CIVIL APPEAL NO. AO2-185-1994]
1 AUGUST 1995

PRACTICE & PROCEDURE: *Further arguments - Appeal to Judge in Chambers - Application for further argument in open Court - Procedure abolished by amendment to Courts of Judicature Act 1964 - Court not advised of amendment - Judgment of Court thereof - Whether a nullity - Appropriate consequential orders - Courts of Judicature Act 1964 s. 68(2).*

In this recovery action, the respondent claimed for the balance sum of monies lent to a borrower, for which the appellant stood guarantor. Subsequent to the proceedings, the respondent applied for and obtained, before the Senior Assistant Registrar (the Registrar), summary judgment in respect of the claim. The appellant appealed to the Judge in Chambers, and on 8 July 1994, the Registrar's order was reversed and unconditional leave to defend was given.

However, some two weeks prior to the aforesaid order, on 24 June 1994, the Courts of Judicature Act 1964 was amended which in effect abolished hearing of further argument in open Court at the instance of the aggrieved party in respect of decisions given in Chambers. The amendment notwithstanding, upon application by the appellant for adjournment of the matter into open Court for further argument following the order of 8 July 1994, the learned Judge, apparently unaware of the amendment, obligingly heard the argument on 19 August 1994 and thereafter reversed himself and reinstated the summary judgment given by the Registrar. In this appeal the appellant sought to challenge the validity of the judgment given by the trial Judge on 19 August 1994 aforesaid.

Held:

Per Mahadev Shankar JCA (delivering the judgment of the Court):

[1] The judgment made in open Court on 19 August 1994 was a nullity and has to be set aside.

[2] The conduct of all concerned, i.e in failing to point out the amendment to the Court, however, raised problems as to the consequential orders that should be made. It is nevertheless the Court's view that the mistake should be put right and that the merits of the appeal from the Registrar's

judgment should be properly argued because it is evident, from the material presented, that the decision given on 8 July 1994 in Chambers was somewhat precipitate.

[3] The respondent's notice of appeal filed on 5 August 1994 is deemed a valid notice of appeal. In consequence, the respondent is given three weeks within which to file and serve a memorandum and record of appeal, so that the appeal on the merits of the Judge's order in Chambers could be disposed of in due course.

[Order accordingly]

***[Bahasa Malaysia** Translation of Headnotes]*

***AMALAN & PROSEDUR:** Hujahan lanjut - Rayuan kepada Hakim dalam kamar - Permohonan untuk hujahan lanjut dalam Mahkamah terbuka - Prosedur dihapuskan melalui pindaan kepada Akta Mahkamah Kehakiman 1964 - Mahkamah tidak dimaklumkan mengenai pindaan - Penghakiman Mahkamah - Samada batal - Perintah-perintah sampingan yang wajar - Akta Mahkamah Kehakiman 1964 s. 68(2).*

Dalam tindakan mendapatkan semula ini, responden menuntut bagi mendapatkan baki jumlah wang yang telah dipinjamkan kepada seorang peminjam bagi yang mana perayu telah menjadi penjamin. Berikutan dengan prosiding tersebut, responden telah memohon untuk mendapatkan, dan telah mendapat, penghakiman terus dihadapan Penolong Kanan Pendaftar (Pendaftar) berhubung dengan tuntutan tersebut. Perayu telah merayu kepada Hakim dalam kamar, dan pada 8 Julai 1994, perintah Pendaftar telah diakas dan kebenaran tidak bersyarat untuk membela telah diberikan.

Lebihkurang 2 minggu sebelum perintah di atas, pada 24 Jun 1994, Akta Mahkamah Kehakiman 1964 telah dipinda, yang mana dalam penguatkuasaannya telah menghapuskan perbicaraan hujahan lanjut di Mahkamah terbuka atas permintaan pihak terkilan berhubung dengan keputusan-keputusan yang telah diberikan dalam Kamar. Tanpa menghiraukan pindaan ini, berikutan permohonan oleh perayu untuk penangguhan perkara tersebut ke Mahkamah terbuka untuk hujahan lanjut ekoran dari perintah bertarikh 8 Julai 1994 di atas, Hakim yang bijaksana, tanpa menyedari pindaan tersebut, telah mendengar hujahan lanjut tersebut pada 19 Ogos 1994. Akibatnya, Hakim telah mengakaskan keputusannya sendiri dan menghidupkan semula penghakiman terus yang telah diberikan oleh Pendaftar. Dalam rayuan ini perayu mencabar keesahan penghakiman yang diberikan oleh Hakim perbicaraan pada 19 Ogos 1994 tersebut.

Diputuskan:

Oleh Mahadev Shankar HMR (menyampaikan penghakiman Mahkamah):

[1] Penghakiman yang dibuat dalam Mahkamah terbuka pada 19 Ogos 1994 adalah batal dan haruslah diketepikan.

[2] Kelakuan kesemua pihak yang berkenaan, atas kegagalan untuk menunjukkan pindaan kepada Mahkamah, walaubagaimanapun, telah membangkitkan masalah berhubung dengan perintah-perintah sampingan yang harus dibuat. Namun begitu ianya merupakan pendapat Mahkamah bahawa kesilapan tersebut haruslah diperbetulkan dan bahawa merit-merit rayuan daripada penghakiman Pendaftar seharusnya dihujahkan dengan betul kerana adalah jelas daripada bahan yang dikemukakan bahawa keputusan yang telah diberikan pada 8 Julai 1994 dalam Kamar adalah agak tergesa-gesa.

[3] Notis rayuan responden yang telah difailkan pada 5 Ogos 1994 adalah dianggap satu notis rayuan yang sah. Akibat daripadanya, responden diberi tempoh selama tiga minggu dalam mana untuk memfailkan dan menyampaikan satu memorandum dan rekod rayuan, supaya rayuan atas merit perintah-perintah Hakim dalam Kamar boleh seterusnya dibicarakan.

[Perintah sekadarnya]

Case referred to:
Standard Chartered Bank v. Yap Ban Tick & Ors. ***(cit)***

Legislation referred to:
Courts of Judicature Act 1964, s. 68(2)

For the appellants - Minderjit Kaur, M/s. Minderjit & Co., Ipoh
For the respondents - Chan Sing Khuen, M/s. Azman, Davidson & Co., Ipoh

JUDGMENT

Mahadev Shankar JCA:

The respondent, Malaysia Smelting Corporation Bhd. (the lender) gave a loan RM282,000 to Haco Sdn. Bhd. (Haco). The appellant (hereafter referred to as the guarantor) and 4 others executed a joint several guarantee of the loan. Haco defaulted and the lender filed a writ in the Ipoh High Court for recovery of the balance of the principal RM213,300, interest of RM63,452.42 and other relief. The guarantor was the first defendant in the action. His substantial defence was that since the guarantee was executed in point of time shortly after the loan was advanced, the consideration was past consideration and the guarantee therefore was void and unenforceable.

a The lender obtained summary judgment against the guarantor under O. 14 before the Senior Assistant Registrar on 19 August 1992. The guarantor's appeal was fixed for disposal before the Judge in chambers.

The guarantor's appeal was heard by the Judge in chambers on 8 July 1994. The Judge allowed the appeal, reversed the order of the Registrar and gave *b* unconditional leave to defend.

At this juncture we would pause to point out that on 24 June 1994 the Judicature Act 1964 was amended whereby s. 68(2) of the said Act was deleted as a result of which the old appellate procedure of hearing further *c* arguments in open Court, at the instance of the aggrieved party in respect of decision given in chambers became obsolete.

Immediately after the decision in chambers, the lender's solicitors sent a letter to the Judge asking for the matter to be adjourned into Open Court for further argument. A copy of this letter was simultaneously served on the guarantor's *d* solicitors.

On 14 July 1994 the Court sent a notice to solicitors of both the lender and the guarantor informing them that the Judge had given a directive that further arguments be heard on 19 August 1994.

e Before us on this appeal the guarantor' Counsel on being questioned by the Bench admitted that she knew on 8 July 1994 that the procedure adopted by the lender' solicitor was misconceived but she opted not to write to the Court or to other solicitor or otherwise inform them of the misconception because according to her, she wanted to raise the matter at the hearing on 19 August *f* 1994. She said she was inhibited from doing so earlier because she did not have the gazette notification with her at the time and she wanted to produce this to the Judge at the hearing.

The lender's Counsel disclosed to us that he was himself in doubt by early August if their procedure was correct and filed a notice of appeal in this Court *g* on 5 August 1994 and served a copy of the same on the guarantor's solicitors. However because the Court had directed them to appear for further arguments on 19 August 1994, he appeared on that day out of deference to the Judge and made his submission on the merits.

h Guarantor's Counsel claims that at the adjourned hearing in Open Court she attempted to raise absence of jurisdiction by way of preliminary objection but she was not successful in so doing. Regrettably there is nothing in the notes of evidence to confirm this.

i After full arguments on the merits in Open Court the Judge purported to reverse himself and reinstated the summary judgment given by the Registrar.

Against this judgment the guarantor's Counsel confined her argument to the single issue as to the validity of the judgment given on 19 August 1994. The repercussions of her inactivity about this point at a time when the error could have been prevented only came to the fore when we called for an explanation. We think this is an appropriate juncture to call the attention of all concerned to our earlier decision in Rayuan Sivil Ni. N-08-139-1994 *Standard Chartered Bank v. Yap Ban Tick & Ors.*

No doubt the judgment made in Open Court was a nullity and we set it aside despite what appears to be its intrinsic merits. The conduct of all concerned however, raised problems as to what consequential orders we should make. The view that we took was that the mistake should be put right and that the merits of the appeal from the Registrar's judgement should be properly argued because it is evident from the material before us that the decision given on 8 July 1994 in Chambers was somewhat precipitate. Our invitation to Counsel for the parties to address us straightaway was not taken up because the guarantor's Counsel said she would need more time.

In the circumstances we made a further order that the lender's notice of appeal filed on 5 August 1994 be deemed to be a valid notice of appeal and that the lender file and serve a memorandum and record of appeal within three weeks so that the appeal on the merits of the Judge's order in chambers could be disposed of in due course.

V.C. George JCA:

I have had the benefit of reading the judgment in draft of my learned brother M. Shankar JCA and respectfully concur with it.

Reported by W.A. Sharif